No. 83-1294

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

AMERICAN MOTORS CORPORATION
and
JEEP CORPORATION,
Petitioners

v.

JUDGE JOSEPH S. LORD, III,
OF THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA,
Respondent

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joseph V. Pinto
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QUESTION PRESENTED FOR REVIEW

Whether the Third Circuit Court of Appeals' denial of American Motors Corporation and Jeep Corporation's* Petitions for Writ of Mandamus requesting therein the disqualification of United States District Court Judge Joseph S. Lord, III from the *Benner* and *Shank* cases because of his personal prejudice against automobile manufacturers represents a departure from the accepted and usual course of judicial proceedings so as to require this Court to grant the within Petition for Writ of Certiorari and fully examine this issue?

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* Pursuant to Supreme Court Rule 28.1, Petitioners state that American Motors Corporation is a publicly owned corporation and that 46.4% of its outstanding shares of common stock is owned by Regie Nacionale deUsines Renault (Renault). Petitioners would further point out that American Motors Corporation is affiliated with and has financial investments in the following entities: Renault/Jeep Sport, Inc.; American Motors Financial Corporation; Arab American Vehicle Company; Rambler Motor (AMC) Ltd.; and Vehicules Automotores Mexicanios, S. A. We further submit that American Motors Corporation is financially affiliated with American Motors Financial Corporation, which wholly owns American Motors Credit Corporation. Finally, Petitioners submit that Jeep Corporation is a wholly owned subsidiary of American Motors Corporation and is financially affiliated with the following entities: Jeep Africa Ltd.; Jeep De Venezuela; Mahindri Ltd.; and Vehicules Automotores Mexicanios, S.A.

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On September 28, 1983, Judge Joseph S. Lord, III, entered an Order denying the within Petitioners' Joint Motion for Recusal. On November 10, 1983, Judge Lord filed an Opinion setting forth the basis for said Order. The Order and Opinion, neither of which are presently officially reported, appear under the following joint caption: *Earl L. Shank and Patricia Ann Shank, individually and Patricia Ann Shank as Administratrix of the Estate of Sherry Lee Shank, deceased v. American Motors Corporation and Jeep Corporation*, Civil Action #82-1794; *Robert Timothy Benner v. American Motors Corporation and Jeep Corporation*, Civil Action #82-2486; United States District Court for the Eastern District of Pennsylvania.

On December 20, 1983, the Third Circuit Court of Appeals filed separate Orders denying the respective Petitions for Writ of Mandamus directed against Judge Lord by Petitioners herein in both the *Shank* and *Benner* cases. No opinion was filed relative to the orders, which are presently unreported and appear under the following separate captions:* *Earl L. Shank and Patricia Ann Shank, Individually, and Patricia Ann Shank as Administratrix of the Estate of Sherry Lee Shank, Deceased, Respondents v. American Motors Corporation and Jeep Corporation, Petitioners*, Judge Joseph S. Lord, III, Respondent, Civil Action #83-3507; and *Robert Timothy Benner, Respondent v. Jeep Corporation and American Motors Corporation, Petitioners*, Judge Joseph S. Lord, III, Respondent, Civil Action #83-3508.

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* These captions set forth a list of all the parties to the proceeding in the Court of Appeals whose judgment is sought to be reviewed in this Court. Therefore, Supreme Court Rule 21.1(b) requiring a statement of this information has been satisfied.

STATEMENT OF JURISDICTION

On December 20, 1983, the United States Court of Appeals for the Third Circuit entered separate Orders denying American Motors Corporation and Jeep Corporation's respective Petitions for Writ of Mandamus in the *Benner* and *Shank* cases. This Court has jurisdiction to review these Orders on Petition for Writ of Certiorari by virtue of 28 U.S.C. §1254(1).

FEDERAL STATUTES UPON WHICH RELIEF IS REQUESTED

This Petition for Writ of Certiorari requests this Court to consider the substantive provisions and relief set forth in 28 U.S.C. §§144 and §455. Section 144 provides as follows:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exits, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 455 provides in pertinent part:

> (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . .

STATEMENT OF THE CASE

Introduction

Judge Joseph S. Lord, III, (Respondent), of the United States District Court for the Eastern District of Pennsylvania, has been assigned the responsibility of supervising the pre-trial and trial proceedings in the separate cases of *Benner v. American Motors Corp., et al.* and *Shank, et al. v. American Motors Corporation, et al.*

During the course of the pre-trial proceedings in each of these cases, Judge Lord has engaged in outrageous conduct (more specifically described below) which has unequivocably demonstrated his personal bias and prejudice against automobile manufacturers. Such conduct has created more than a substantial doubt whether American Motors Corporation and Jeep Corporation (hereafter Petitioners) will receive a fair trial before this judge. Immediate intervention by this Court during the pre-trial stages of these cases is necessary to prevent this imminent miscarriage of justice.

This joint Petition for Writ of Certiorari requests permission to allow Petitioners within to fully present this identical issue in both cases before this Court to prevent an irreparable injury and manifest injustice should Judge Lord be permitted to further preside over these matters.

(I) *Procedural Factual History of the Cases*:

(A) *The Benner Case*:

On November 14, 1981, Robert Timothy Benner was rendered a paraplegic as a result of injuries sustained while a passenger in a 1975 Jeep CJ-5 vehicle which had been involved in a single vehicle accident in Sandy, Utah. Plaintiff Benner thereafter filed a Complaint in the Court of Common Pleas of Philadelphia County against the Petitioners, alleging that the accident and his resulting injuries were caused by a defective condition of the subject Jeep vehicle. The case was

thereafter removed to United States District Court for the Eastern District of Pennsylvania and placed on the calendar of Judge Lord. Federal jurisdiction was predicated upon diversity of citizenship pursuant to 28 U.S.C. §1332.

On December 9, 1982, Judge Lord heard oral argument with respect to Petitioners' Motion for Leave to Join a Third Party Defendant and Petition to Transfer Venue. Jerrold P. Anders, Esquire was present on behalf of Petitioners, and Robert Slota, Esquire was present on behalf of plaintiff Benner. The following discussion summarizes what transpired at the conclusion of this hearing.

After denying both the Motion and Petition, Judge Lord was given a Motion to Compel Discovery by Mr. Slota. Judge Lord started to sign the Order attached thereto before Mr. Anders even had an opportunity to review a copy of the Motion. Mr. Anders thereafter strenuously objected to Judge Lord's granting the Motion at that time, on the grounds that a party, pursuant to Local Rule 20, was entitled to a minimum of ten days to respond to a Motion. Judge Lord then told Mr. Anders that the Petitioners would have ten days and "no more" to respond to said Motion.

Judge Lord then asked Mr. Slota how much additional time plaintiff would need to prepare his case for trial. Mr. Slota responded that he could be ready for trial in two months if the Petitioners provided all of the requested discovery documents. When Judge Lord posed the same question to counsel for Petitioners, Mr. Anders responded that he could not answer that question until he first spoke with Joseph V. Pinto, Esquire, the supervising attorney who would actually try the case for the Petitioners. Judge Lord, nevertheless, advised both Messrs. Slota and Anders that discovery would have to be completed within two months from the date of that conference.

Judge Lord then stated to Mr. Anders, off the record

but in the presence of Mr. Slota, that "automobile manufacuturers are the most devious bunch of defendants" he has ever seen. Judge Lord further stated that it has been his experience that automobile manufacturers seldom give plaintiffs the information to which they are entitled during discovery. Finally, Judge Lord said that automobile manufacturers were "simply unethical".

(B) *The Shank Case*:

On June 17, 1980, Sherry Lee Shank died as a result of injuries which she sustained while a passenger in a 1978 Jeep CJ-5 vehicle which was involved in a single vehicle accident in Chichester Township, Pennsylvania.

The *Shank* estate and the minor-decedent's surviving parents thereafter instituted a wrongful death and survival action in the Court of Common Pleas of Philadelphia County against Petitioners heren alleging that the accident and fatal injuries to the decedent-minor were caused by an alleged defective condition of the subject Jeep vehicle. The case was thereafter removed to the United States District Court for the Eastern District of Pennsylvania, at which time this case was also placed on the calendar of Judge Lord. Federal jurisdiction was predicated upon diversity of citizenship pursuant to 28 U.S.C. §1332.

On April 15, 1983, counsel for Petitioners, Mr. Pinto, and counsel for Plaintiff Shank, Garland Cherry, Esquire, appeared before Judge Lord for a discovery conference relative to Plaintiff Shank's Motion To Compel Answers to Interrogatories. During the course of this conference, Judge Lord stated to Mr. Pinto, off the record, that "automobile manufacturers were amongst the most devious groups of defendants" he has ever seen.

Mr. Pinto thereafter requested that Judge Lord's court reporter enter the conference room. At Mr. Pinto's request, Judge Lord again repeated his prior comments, on the record, which included his statement that "automobile manufacturers are amongst the most devious

groups of defendants that I have ever seen in twentyone years on the bench." [App. A-19]

At one other point during this conference, Mr. Pinto pointed out to Judge Lord the burdensome nature of some of Plaintiff Shank's interrogatories. Mr. Pinto then suggested to Judge Lord that if the Petitioners were to make attempts to respond to interrogatories of this nature, it might put them out of business. Judge Lord responded that "perhaps it would be good for American Motors to go out of business". Judge Lord likewise later repeated this comment on the record, stating that although he did not believe this would occur, "if it puts them out of business, maybe they deserve to be put of business." [App. A-19]

(C) *The Joint Motion By Petitioners In the District Court Requesting Judge Lord to Recuse Himself In Both The Benner And Shank Cases and Results of the Oral Agrument Concerning the Motion.*

On June 7, 1983, Petitioners filed with the Lower Court a Motion for Recusal of Judge Lord pursuant to 28 U.S.C. §§144 and 455(a) and (b)(1).

The dispositive issue raised in this joint Motion was whether Judge Lord, because of the above-referenced comments about car manufacturers in the *Shank* and *Benner* proceedings, was personally biased and prejudiced against car manufacturers, a class in which Petitioners are members, thereby denying Petitioners' Seventh Amendment Consitutional right to a fair trial before an impartial judicial tribunal. Assuming Judge Lord's prejudice and bias against car manufacturers was of a judicial origin, Petitioners alternatively argued that it was nevertheless so perversive in nature so as to require him to recuse himself under the circumstances.

On September 19, 1983, Judge Lord heard oral argument relative to Petitioners' Recusal Motion. Several remarks by Judge Lord at this hearing further established his personal bias and pre-disposition against auto-

mobile manufacturers. A critical liability issue in the *Shank* and *Benner* cases relates to the allegation that Jeep CJ vehicles have a higher propensity to "roll over" than certain other vehicles and are therefore defective. Judge Lord, however, has already indicated his predisposition that this defect allegation is true. During oral argument, Judge Lord remarked that "[m]aybe that's why they [Jeep vehicles] turn over so easily because they don't know about these things." [App. A-42] When later confronted with this remark by Mr. Pinto, Judge Lord said that it was meant "sarcastically". [App. A-53]

Judge Lord later added, however, that Petitioners' discovery responses did not include any written information about vehicle testing and again he remarked "[m]aybe that is why they turn over so easily." [App. A-53] Mr. Pinto again stated to Judge Lord that it seemed as though His Honor had already formed the mental impression that Jeep vehicles turn over easily. Judge Lord's response was "[w]ell, they apparently do." [App. A-53]

At another point, during the hearing, Judge Lord stated: "Didn't the government just have a similar experience with General Motors . . . concealing information about the brake reaction." [App. A-43]

On September 28, 1983, Judge Lord entered an Order denying Petitioners' Motion for Recusal. On November 10, 1983, Judge Lord filed an Opinion setting forth the basis why Petitioners' Recusal Motion was denied.

(D) *Petitioners' Mandamus Action In The Court of Appeals Requesting Judge Lord's Disqualification.*

On October 28, 1983, Petitioners filed in the United States Court of Appeals for the Third Circuit separate Petitions for Writ of Mandamus directed against Judge Lord requesting the Court to disqualify Judge Lord from all future proceedings in the *Shank* and *Benner* matters. On December 20, 1983, the Third Circuit entered Orders, without an Opinion, denying Petitioners' requested relief. This Petition for Writ of Certiorari requests this Court to review the propriety of those Orders.

ARGUMENT

(I) *Introduction:*

Petitioners, American Motors Corporation and Jeep Corporation, respectfully submit that the refusal by the Third Circuit Court of Appeals to disqualify Judge Joseph S. Lord, III, from the *Benner* and *Shank* cases is an impermissible departure from what is the accepted and usual course of judicial proceedings.

This Court has the discretionary power to review the propriety of the Court of Appeals' rulings on this issue pursuant to Supreme Court Rule 17.1(a) by granting the within Petition for Writ of Certiorari.

For the reasons set forth below, we request the opportunity to fully brief and orally argue the merits of this special and important matter to prevent the irreparable injury and manifest injustice that will inure to the Petitioners should Judge Lord continue to participate in these proceedings.

(II) *The Court of Appeals' Refusal to Disqualify Judge Lord From The* Benner *and* Shank *Cases Represents A Significant Departure From The Accepted And Usual Course of Judicial Proceedings, Thereby Requiring This Court's Review By Granting The Within Petition For Writ of Certiorari.*

This Court has consistently held that due process requires a judge to approach a case from an impartial and detached posture. *See, e.g., Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In Re Murchison*, 349 U.S. 133 (1955). The failure of a judge to satisfy this standard jeopardizes the public's confidence in our judicial system, which is predicated upon a course of impersonal and reasoned judicial decisions.

These fundamental principles of fairness have been underminded by the Court of Appeals' refusal to disqualify Judge Lord. For the reasons sets forth below, this Court's immediate intervention into these cases is nec-

essary to insure that Petitioners' right to a Trial before an impartial judge is preserved.

(A) *The Court of Appeals' Refusal to Disqualify Judge Lord From These Cases Will Deny Petitioners' Their Constitutional Right to Have An Impartial Decisionmaker Preside Over the Pre-Trial and Trial Stages Of This Litigation.*

The *Benner* and *Shank* cases are complex product liability actions involving difficult technical issues. Discovery has been extensive and relates primarily to technical inquiries concerning Jeep CJ vehicles. Numerous discovery motions have been filed by all of the parties in these cases and several orders have been entered by Judge Lord relative to some of those motions. It is anticipated that additional discovery motions will be filed in the future by the parties to this litigation.

The presence of an impartial trial judge to resolve these discovery disputes is of paramount importance since his rulings will play in important role in the ultimate outcome of the litigation. First of all, due process clearly requires as much to prevent a party from obtaining undiscoverable information. Such a result may ultimately place the producing party at such a disadvantage so as to require it to either settle a case it otherwise would have tried or settle it for an amount far above what would be reasonable under the circumstances.

An impartial judge is further necessary for a fair resolution of discovery disputes since he will make the final decision on them in most instances. Approximately ninety-five percent (95%) of all civil cases are settled before verdict. Discovery orders are interlocutory in nature and are rarely certified for immediate appellate review. It is assumed they are the product of an impartial and reasoned decision by the judge after full consideration of the opposing arguments. An impartial judge, therefore, is the fundamental protection for a party to ensure a fair resolution of discovery disputes during litigation.

We submit that the past and future involvement of Judge Lord in the *Benner* and *Shank* cases has and will continue to deny Petitioners' due process right to have the discovery disputes and all other pre-trial matters resolved in an impartial manner. His personal bias and prejudice against automobile manufacturers is so blatant and perverse so as to affect every stage of this litigation far beyond what might otherwise be acceptable forms of judicial ill-temperament or hostility. All other avenues of relief to have Judge Lord disqualified have been exhausted. Post-trial review of this issue of critical importance will be inadequate to remedy the severe hardship placed upon Petitioners during the pre-trial phases of these cases. We now appeal to this Court for pre-trial relief in a final effort to preserve our due process rights.

(B) *The Court of Appeals' Refusal to Disqualify Judge Lord Represents A Significant Departure From the Accepted And Usual Grounds For Removing Judge Lord From These Cases Pursuant To the Federal Disqualification Statutes And Controlling Precedent.*

Congress enacted 28 U.S.C. §§144 and 455 to ensure that judicial impartiality is preserved and disqualification results if a judge's conduct falls below that standard. Section 144 requires a judge to disqualify himself if, after assuming as true the facts alleged in the required affidavit, a reasonable person would conclude that a judge in fact has a personal bias/prejudice against a party. *Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976). Section 455 is less stringent and requires a judge to disqualify himself *sua sponte* if "his impartiality might reasonably be questioned," i.e., if a reasonable man, knowing all the circumstances, "would harbor doubts about the judge's impartiality." *Potashnick v. Port City Con-*

struction Co., 609 F.2d 1101 (5th Cir. 1980). *See United States v. Nobel*, 696 F.2d 231 (3d Cir. 1982).

Petitioners recognize that no judge can be altogether free of bias or prejudice "unless he had no prior experience or knowledge of the workings of the world." *Note:* "Disqualification of Judges and Justices in the Federal Courts," 86 Harvard L. Rev. 736, 751 (1973). *See In Re J.P. Linahan, Inc.*, 138 F.2d 650, 651-53 (2d Cir. 1943). For this reason, a judge's impersonal opinions based upon his background and associations are permissible. *See e.g., United States v. Schreiber*, 599 F.2d 534, 538 (3d Cir. 1979); *Parker Precision Products Co. v. Metropolitan Life Ins. Co.*, 407 F.2d 1070, 1077-78 (3d Cir. 1969). Likewise permissible is judicial knowledge gained from a judge's prior "Judicial exposure to the defendant or prior judicial rulings adverse to defendant in same or different cases." *United States v. Sinclair*, 424 F. Supp. 715, 718 (D. Del. 1976).

Judge Lord contends that his "judicially formed opinion" about automobile manufacturers stems from an "attitude derived from his experience on the bench," quoting *Phillips v. Joint Legislative Com.*, 637 F.2d 1014, 1020 (5th Cir. 1981). [App. A-10]. As stated by Judge Lord:

> "Defendants' conduct in the present cases is typical of the type of conduct by automobile manufacturers which constitutes the basis of my judicially formed opinion." [App. A-10].

The "conduct" to which Judge Lord refers relates to Petitioners' alleged "tactics during discovery" in these cases. [App. A-26]. For this reason, Judge Lord claims that his remarks about Petitioners and other automobile manufacturers are of a *judicial* origin. This contention is absolutely erroneous. When Judge Lord first made his biased remarks about automobile manufacturers in the *Benner* case on December 9, 1982, he had not yet been

presented with *any* discovery motions requiring a substantive ruling in either the *Benner* or *Shank* cases.*

Judge Lord's initial comments, therefore, about automobile manufacturers were not derivative of his *judicial* experience with the Petitioners in these cases. Rather, they were the product of his personal bias against this class of defendants through his prior experience with *other* automobile manufacturers involved in *other* cases totally unrelated to the *Shank* and *Benner* matters. Simply stated, Judge Lord's admitted "judicially formed opinion" about Petitioners in these cases is nothing short of his finding us guilty by way of association with other automobile manufacturers. The Court of Appeals has sanctioned this unjust result.

This Court must now decide whether the Court of Appeals' decision is judicially acceptable and in accordance with other decisions from the Circuit Courts on this very issue. First of all, the Court of Appeals decision sanctions as impartial conduct Judge Lord's remarks in the *Benner* case that automobile manufacturers were "simply unethical". It also holds that Judge Lord is not predisposed against Petitioners based on his experience with other automobile manufacturers even though Judge Lord stated in both the *Benner* and *Shank* cases that automobile manufacturers were the "most devious bunch of defendants" with whom he has ever dealt while on the bench. The decision further holds that Judge Lord will resolve all pre-trial issues fairly, despite his expressed willingness in the *Benner* case to grant a motion without allowing the Petitioners any opportunity

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* The only discovery motions filed with the Court prior to December 9, 1982 in either the *Shank* or *Benner* cases was in the latter case. Specifically, plaintiff Benner had filed a Motion for Sanctions against Petitioners herein on October 19, 1982 for not responding to plaintiff's first set of interrogatories. The following day, October 20, 1982, Petitioners filed responses to said discovery, which resulted in the Court entering an Order on November 26, 1982 denying Plaintiff's Motion as moot.

to be heard. This decision finally holds that Judge Lord has not formulated an opinion on the merits of these cases, despite his expressed acceptance on the record as a fact plaintiffs' product defect allegations against the Petitioners.

The Court of Appeals conclusion that such judicial conduct did not, at a minimum, present an "appearance of partiality," within the meaning of 28 U.S.C. §455, on the part of Judge Lord is a significant deviation from the accepted course of judicial proceedings and conduct. We submit that reasonable men, knowing all of the circumstances would be outraged by Judge Lord's remarks and find his conduct deplorable. Immediate pre-trial intervention by this Court is the only recourse left to Petitioners to ensure that their due process rights are preserved.

(III) *Conclusion:*

There are two principal overriding reasons why this Court should intervene during the pre-trial stages of these cases and grant this Petition: (1) Judge Lord is biased and prejudiced against the Petitioners because of his prior unfavorable judicial experience with other automobile manufacturers in other cases, thus deciding that we are "guilty by association" with those other automobile manufacturers"; (2) Judge Lord has already expressed his agreement with Plaintiffs' defect allegations in these cases.

The Court of Appeals has sanctioned the foregoing results. We respectfully request that this Court immediately intervene and prevent the obvious irreparable harm that will inure to the Petitioners if Judge Lord is permitted to further preside over these cases. When presented with legally sufficient evidence and authority to disqualify Judge Lord, the Court of Appeals departed from the standard of acceptable and usual course of judicial proceedings and refused to disqualify him.

This Court now has both the opportunity and power

to reverse the Court of Apeals' decision and disqualify Judge Lord assuming the within Petition is granted and the entire merits of this matter are presented for this Court's review. We submit that this Court should grant the within Petition for Writ of Certiorari by American Motors Corporation and Jeep Corporation and allow the opportunities for both briefing and oral argument on the issue raised herein.

Respectfully submitted,

WHITE AND WILLIAMS
Attorneys for Petitioners
American Motors Corp. and
Jeep Corporation

By_____
Joseph V. Pinto
(Counsel of Record)
William J. Conroy

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3508

November 8, 1983

ROBERT TIMOTHY BENNER,
Plaintiff and Respondent
v.
JEEP CORPORATION and
AMERICAN MOTORS CORPORATION,
Defendants and Petitioners
and
THE HONORABLE JOSEPH S. LORD, III,
Nominal Respondent
(Related to E.D. D.C. Civil No. 82-2486)

Present: HUNTER, HIGGINBOTHAM and SLOVITER,
Circuit Judges.

1. Petition for Writ of Mandamus,

in the above-entitled case.

Respectfully,

enc. Deputy Clerk 7-3080
vy

The foregoing Motion is Denied

By the Court,

Judge

Dated: December 20, 1983
vy/cc (J.V.P., Esq.
(W.J.C., Esq.
R.E.S., Esq.
J.S.L., III

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3507

November 8, 1983

Re: EARL L. SHANK AND PATRICIA ANN SHANK, Individually, and PATRICIA ANN SHANK as Administratrix of the Estate of Sherry Lee Shank, Deceased,
Plaintiffs and Respondents
v.
AMERICAN MOTORS CORPORATION and JEEP CORPORATION,
Defendants and Petitioners
and
THE HONORABLE JOSEPH S. LORD, III,
Nominal Respondent
(Related to E.D. D.C. Civil No. 82-1790)

Present: HUNTER, HIGGINBOTHAM and SLOVITER,
Circuit Judges.

1. Petition for Writ of Mandamus,

in the above-entitled case.

Respectfully,

enc. Deputy Clerk 7-3080
vy

The foregoing Motion is Denied

By the Court,

Judge

Dated: December 20, 1983
vy/cc (J.V.P., Esq.
(W.J.C., Esq.
(G.D.C., Jr., Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EARL L. SHANK and	:	Civil Action
PATRICIA ANN SHANK, Individually,	:	
PATRICIA ANN SHANK, as	:	
Administratrix of the Estate of	:	
SHERRY LEE SHANK, Deceased	:	
v.	:	
AMERICAN MOTORS CORPORATION,	:	
and	:	
JEEP CORPORATION	:	
and	:	
DONALD PUSEY	:	NO. 82-1794
ROBERT TIMOTHY BENNER	:	Civil Action
	:	
v.	:	
JEEP CORPORATION and	:	
AMERICAN MOTORS CORPORATION	:	NO. 82-2486

ORDER

AND NOW, this 28th day of September, 1983, it is hereby ORDERED that defendants' motion for recusal be and is DENIED.

BY THE COURT:

Joseph S. Lord, III, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EARL L. SHANK, and	:	Civil Action
PATRICIA ANN SHANK, Individually,	:	
and PATRICIA ANN SHANK, as	:	
Administratrix of the Estate of	:	
SHERRY LEE SHANK, Deceased	:	
v.	:	
AMERICAN MOTORS CORPORATION,	:	
and	:	
JEEP CORPORATION	:	
and	:	
DONALD PUSEY	:	NO. 82-1794
ROBERT TIMOTHY BENNER	:	Civil Action
v.	:	
JEEP CORPORATION and	:	
AMERICAN MOTORS CORPORATION	:	NO. 82-2486

OPINION

Lord, *S.J.* November 13, 1983

I. Introduction

On June 17, 1980, Sherry Lee Shank died as a result of injuries sustained while a passenger in a 1978 Jeep CJ Renegade which rolled over in a single vehicle accident. On November 14, 1981, Robert Timothy Benner was rendered a paraplegic as a result of injuries sustained while a passenger in a 1975 Jeep CJ-5 which rolled over in a single vehicle accident. Plaintiffs in both the *Shank* and *Benner* cases thereafter instituted products liability actions against defendants American Motors Corporation and Jeep Corporation, alleging that the injuries were caused by the defective design, manufacture, and assembly of the subject jeeps. On June 7, 1983, defendants requested that I recuse myself on the

ground that I am personally biased against car manufacturers, a class in which defendants are members. Defendants further allege that this bias was extrajudicially acquired. Defendants point to the following colloquy, which took place at a discovery conference in the *Shank* case on April 15, 1983, as providing a basis for their motion:

> THE COURT: Very well. This is a suit to recover damages for alleged defects in a motor vehicle called a "Jeep" manufactured and sold by American Motors Company as I understand it.
>
> In previous conferences I have encountered unwillingness to answer, evasiveness, chicanery, intentional misunderstanding of the questions that were asked and refusal to answer based on an alleged misunderstanding or non-knowledge of a question.
>
> It now becomes perfectly obvious to me that the defendant did understand the question, could have understood the question, and could have answered the interrogatories.
>
> It also becomes increasingly obvious to me that the defendant is attempting to hide information, conceal information, and evade answering interrogatories.
>
> Therefore, I am ordering that all interrogatories that have been asked be answered insofar as they relate to the defect contained in the Complaint and not beyond the defect complained of in the Complaint.
>
> Mr. Pinto has told me that this will put the American Motors Company out of business. Aside from the fact that I just simply don't believe that whatsoever, that's too bad. If it puts them out of business, maybe they deserve to be put out of business.

Is there anything else you want me to add to what I said before?
(pause)
MR. PINTO: Well, you might want to add your previous comments that "Automobile manufacturers are amongst the most devious groups of defendants that you have ever seen."
THE COURT: I certainly adopt that.

"Automobile manufacturers are among the most devious groups of defendants that I have ever seen in 21 years on the Bench."

Also, I might add that in the case of at least one automobile manufacturer, it's the only case I can remember in which I entered a Default Judgment for evasiveness and failure to answer interrogatory questions, following which the case was settled for $500,000.
MR. PINTO: Well, we ought to make clear that doesn't happen to be the defendant here.
THE COURT: It is not the defendant here. It's simply —
MR. PINTO: Although we are being found guilty by association.
THE COURT: No, it's simply in keeping with the assertion that you asked me to make: "That automobile manufacturers are the most devious group of defendants I have ever encountered."

On September 28, 1983 I denied the motion. This opinion explains why.

II. Applicable Law

Defendants' recusal motion is made pursuant to 28 U.S.C.
§144 and 28 U.S.C. §455. The former section provides:

> Whenever a party to any proceeding in a district court makes and files a *timely and sufficient affidavit* that the judge before whom the matter is pend-

ing has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The *affidavit shall state the facts and the reasons for the belief that bias or prejudice exists*, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. (Emphasis added).

28 U.S.C. §455 reads in relevant part:

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

. . .

The mere filing of an affidavit under §144 does not automatically disqualify a judge from hearing a case. *United States v. Townsend*, 478 F.2d 1072, 1073 (3d Cir. 1973). It is the duty of a judge to determine whether the affidavit is timely and legally sufficient. *Id.* The allegations of bias or prejudice must set forth specific facts including time, place, persons and circumstances. *Id.* at 1074.

A. Timeliness

Defendants filed a joint recusal motion with respect to both the *Shank* and *Benner* cases. The motion and af-

fidavit, however, were not timely. An affidavit is untimely when the party significantly invokes participation by the court in pretrial motions or other judicial proceedings between the time he first learned of the asserted prejudice and the time the §144 motion was filed. *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978); *Samuel v. University of Pittsburgh*, 395 F. Supp. 1275, 1279 (W.D. Pa. 1975), *vacated on other grounds*, 538 F.2d 991 (3d Cir. 1976). The affidavit asserts that defendants first became aware of my alleged prejudice at a hearing in the *Benner* case on December 9, 1982. Defendants' recusal motion, however, was not filed until June 7, 1983. In the intervening six month period, defendants in the *Benner* case (1) moved for a discovery conference; (2) moved to compel an inspection of the vehicle described in plaintiff's complaint and for a protective order to preclude discovery of information obtained submitted a stipulation providing defendants with an extension of time to respond to plaintiffs' motion to compel; (4) answered plaintiffs' motion to compel more sufficient answers to interrogatories; and (5) participated in a discovery conference scheduled by me to resolve plaintiffs' motion to compel. Thus, similar to the *Benner* case, defendants affirmatively invoked the participation of this court between the time they first learned of the alleged bias and the time they filed the §144 motion. The motion is untimely in both cases.

B. Extrajudicial Origin

Because defendants have also suggested that I recuse myself, *mea sponte*, under 28 U.S.C. §455, I did not rely solely on the untimeliness of their §144 affidavit.[2] This circuit has specifically held that only

2. Unlike §144, §455 does not contain any procedural requirements by which a litigant can assert that a judge should be disqualified. Section 455 is aimed directly at judges and requires voluntary disqualification when the requisite prejudice exists.

extrajudicial bias forms a basis for recusal under either §144 or §455. *Johnson v. Trueblood*, 629 F.2d 287, 290-91 (3d Cir. 1980), *cert.* purely conclusory. There are no "[f]acts including time, place, persons, and circumstances," *United States v. Townsend, supra*, set forth which lend factual underpinnings to a conclusion that the charged bias was not judicially acquired.

Indeed, the very statement on which defendants rely shows on its face that its origin was judicial. "Automobile manufacturers are among the most devious groups of defendants I have ever seen in twenty-one years on the Bench." That statement itself shows that my feeling arose from my experience as a judge. And the very next sentence[3] shows affirmatively that the statement had a judicial origin.

A judicial attitude even though developed partly through previous experience on the bench, and not wholly as a result of participation in the instant case, cannot serve as a basis for recusal. As stated in *United States v. Sinclair*, 424 F.Supp. 715, 718 (D.Del. 1976), *aff'd*, 566 F.2d 1171 (3d Cir. 1977):

> [I]t is . . . clear that a claim of bias or prejudice based on judicial knowledge gained from prior hearings or *other cases* is not sufficient grounds for disqualification of a judge whether it be from prior judicial exposure to the defendant or prior judicial rulings adverse to the defendant in the same or different cases (emphasis added).

Further, it has been stated that:

> A showing of prior judicial exposure to the *same* parties does not suffice to demonstrate personal bias. . . . It follows that a prior judicial exposure to

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3. "Also, I might add that in the case of at least one automobile manufacturer, it's the only case I can remember in which I entered a Default Judgment for evasiveness and failure to answer interrogatory questons . . . ."

> the same type of case brought by the same law enforcement officers but involving different parties is an even less adequate basis to show personal bias (citation omitted).

United States v. Jackson, 627 F.2d 1198, 1207 n.20 (D.C. Cir. 1980).

Perhaps best summarizing the law on this point, it has been held that "a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench." *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed. 2d 483 (1982); *United States v. Peltier*, 553 F. Supp. 886, 889 (D.N.D. 1982).[4] The last statement in *Phillips* is precisely the situation here as revealed by the affidavit's own language.

Defendants' conduct in the present cases is typical of the type of conduct by automobile manufacturers which constitutes the basis of my judicially formed opinion.

1. Benner v. AMC and Jeep Corporation

This case has been stalled in the early stages of discovery since the complaint was filed in April, 1982. Plaintiff 's first set of interrogatories were filed on June 29, 1982. Defendants' answers, which were not filed until October 20, 1982, after plaintiff had filed a motion to

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4. *See also Sperry Rand Corp. v. Pentronix, Inc.* 403 F. Supp. 367, 371 (E.D. Pa. 1975) ("[a] distinction must be drawn between a judicial determination derived from evidence and lengthy proceedings had before the court, and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources beyond the four corners of the courtroom) *quoting In re Federal Facilities Realty Trust*, 140 F. Supp. 522, 526 (N.D. Ill. 1956).

compel, were replete with objections on the grounds that the interrogatories were vague, irrelevant, overbroad and unduly burdensome. Some answers, though not raising specific objections, were simply cavil. For example, plaintiffs' interrogatory No. 2 asking "how long has the defendant been manufacturing and selling the Jeep CJ-5 vehicle" met with the response that "defendant does not manufacture nor sell Jeep CJ-5 vehicles." This answer can charitably be described as disingenuous. Although technically correct — it was not American Motors Corporation, but rather its wholly owned subsidiary, Jeep Corporation, that manufactured and sold Jeep CJ-5's — it would be naive to believe that defendant did not understand or could not have more appropriately answered the question, especially since Jeep Corporation had been brought in as a defendant before the filing of the answers.[5]

2. *Shank v. AMC and Jeep Corporation*

Like *Benner v. AMC*, this case has been mired in the early stages of discovery since the complaint was filed in March, 1982. The frustration continues today. On July 2, 1982, plaintiffs sent their first set of interrogatories to defense counsel. After two requests for extension of time to answer, both of which were made later, were granted, defendants finally filed their answers on October 1, 1982. They objected to or allegedly found themselves unable to respond to approximately seventy percent of the interrogatories.

After a meeting between plaintiffs' and defendants' counsel on November 4, 1982 to resolve discovery

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5. At the time the interrogatories were filed, American Motors Corporation was the only defendant. On October 14, 1982, it was stipulated and agreed that plaintiff be allowed to amend his complaint to add his claims against Jeep Corporation. The amended complaint was filed on October 14, 1982. American Motors Corporation's answers to interrogatories were not filed until October 20, 1982.

differences proved unsuccessful, plaintiffs requested a discovery conference. A conference was then scheduled for December 3, 1982, but was later cancelled when defense counsel objected to plaintiffs' failure to state in writing exactly which interrogatories were in dispute. A pre-trial conference was then held on January 11, 1983 in which I was advised of the status of plaintiffs' interrogatories. I was also advised of defense counsel's desire to learn the identity of all experts who would be used by plaintiffs in the litigation.

As a result of the conference, I entered an order on January 14, 1983 requiring plaintiffs to identify all experts within thirty days and requiring plaintiffs to file any motion to compel answers to interrogatories within thirty days. Plaintiffs then filed a motion to compel more sufficient answers and defendants filed an answer detailing their continued objections. Because the parties were still so far apart with respect to this first set of interrogatories, I scheduled another conference for April 15, 1983.

The purpose of the April 15 conference was to prod the parties amicably to resolve discovery disputes so that the then completely stalled litigation could proceed. Defense counsel, however, repeatedly stated that plaintiffs' interrogatories were overly broad, burdensome, irrelevant, and could not be answered without incurring significant financial expense. For example, plaintiffs' interrogatory No. 9 asked "with respect to all lawsuits brought against AMC or Jeep Corporation alleging that a jeep vehicle is defective, regardless of the defect alleged give the full caption, date, court term and number and any other information to identify each suit." Defendants' answer stated: "Defendants object to this interrogatory on the grounds that it is overbroad, unduly burdensome and seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence and seeks information subsequent to the date of the accident alleged in this case which is inadmissible

as a matter of public policy." This answer is either fatuous or deliberately deceptive. A computer could no doubt retrieve the statistical information with no burden and of course the opportunity for plaintiffs to investigate other accidents could lead to the discovery of highly relevant evidence.

Many of plaintiffs' other interrogatories were met with similar responses. Admittedly, many of plaintiffs' interrogatories were not framed as narrowly as possible, but defendants, rather than answer the questions to the extent possible, declined to answer the questions at all, claiming they were vague, irrelevant, overly broad, and burdensome. Further, if defendants' objections had any validity, they could have been made without having to request two extensions.

At the April 15 conference, I was shown two letters dated August 3, 1973 written by defendants to the National Highway Traffic Safety Administration. In light of the contents of these letters, two interrogatories deserve special attention. For ease of contrast and comments, I shall set forth in columnar form the interrogatories, the answers, and excerpts from the letters with comments:

Interrogatories	**Answers**	**Letters and Comments**
Benner #12: "Does the defendant recognize that the 1975 Jeep CJ-5 vehicles have a greater *tendency to roll over* or overturn . . .	"The term 'tendency to rollover' is not a term that is in common usage in the automotive engineering field and does not have an established meaning or definition."	"An investigation of vehicle crash data indicates that in general vehicles *do not roll over* due to any *inherent tendency toward rollover* in the vehicle itself, but rather the *rollover* is a result of leaving the highway." I quote this merely as an example.

Interrogatories	Answers	Letters and Comments
		Defendants used the term "tendency to roll over" ten more times in its letters, with no apparent difficulty in understanding its meaning. In addition, the letters referred to "rollover resistance" seven times and the word "rollover" (apart from the above) twenty-one times.
than an *ordinary automobile*" (emphasis added)?	"Defendant objects to this interrogatory as vague in that the term 'ordinary automobile' is not defined and includes vehicles with widely differing dimensions, designs, and purposes."	"Jeep Corporation wishes to further point out that *certain classes and types of vehicles must contain a greater tendency for rollover than others as a result of practical design for their intended usage.*" . . . "These vehicles are all designed for off-road as well as on-road usage. In order to provide a useful, practical vehicle for the off-road environment, *Jeep must design to a different set of design criteria than those used for vehicles intended for on-road use only.*" . . .

Interrogatories	Answers	Letters and Comments
		"It is likely that the *tendency for rollover* would be greater than that of a *a typical passenger car* (emphasis added). Obviously, defendants understood what was meant by an "ordinary automobile." Signed "F.A. Stewart, Vice President, Safety and Reliability."
Shank #11: "Give the name, address, telephone number, job title, department and other pertinent information needed to identify each and every person, group, department, unit, agency, etc. within AMC or Jeep Corporation responsible for consumer safety in the Jeep vehicles from the time AMC acquired Jeep Corporation until the present."	"Defendants are not certain what plaintiffs mean by 'consumer safety' in this context. Safety is a part of vehicle performance, and is therefore involved in all phases of vehicle design and manufacture, and is inherent in the job responsibilities of all personnel involved in vehicle design and manufacture."	

After about an hour of discussion at the April 15 conference, counsel requested the presence of a court reporter, a request that I granted. The colloquy quoted earlier then ensued.

Since defendants allege, without factual basis, that my opinion was extrajudicially formed, I have recited defendants' conduct in a judicial proceeding, not as showing that my opinion sprang from this case alone, but only

as illustrative of the conduct by automotive manufacturers I have encountered as a judge which led to the formation of my opinion.

III. Conclusion

For the foregoing reasons, defendants' motion to recuse was denied.

Joseph S. Lord, III, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EARL L. SHANK and PATRICIA ANN SHANK, Individually and PATRICIA ANN SHANK as Administratrix of the Estate of SHERRY LEE SHANK, Deceased	:	Civil Action
v.	:	
AMERICAN MOTORS CORPORATION, JEEP CORPORATION and COMPTON ADVERTISING, INC.	:	
v.	:	
DONALD W. PUSEY	:	NO. 82-1794

Philadelphia, Pennsylvania
Friday, April 15, 1983

Before: HONORABLE JOSEPH S. LORD, III,
Chief Judge Emeritus

DISCOVERY CONFERENCE
(IN CHAMBERS)

PAUL J. McGOWAN
OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106

APPEARANCES:

GARLAND D. CHERRY, JR. ESQ.,
(117 North Olive Street
Media, Pennsylvania 19063)
For the Plaintiffs.

WHITE AND WILLIAMS
BY: JOSEPH V. PINTO, ESQ.,
For Defendants American Motors Corporation and Jeep Corporation

LIEBERT, SHORT, FITZPATRICK & LAVIN
BY: JOHN M. CORCORAN, ESQ.,
For Donald W. Pusey, Third Party Defendant.

(The following was placed on the record at 2:53 p.m.)

THE COURT: Very well. This is a suit to recover damages for alleged defects in a motor vehicle called a "Jeep," manufactured and sold by American Motors Company as I understand it.

In previous conferences I have encountered unwillingness to answer, evasiveness, chicanery, intentional misunderstanding of the questions that were asked and refusal to answer based on an alleged misunderstanding or nonknowledge of a question.

It now becomes perfectly obvious to me that the defendant did understand the question, could have understood the question, and could have answered the interrogatories.

It also becomes increasingly obvious to me that the defendant is attempting to hide information, conceal information, and evade answering interrogatories.

Therefore, I am ordering that all interrogatories that have been asked be answered insofar as they relate to the defect contained in the Complaint and not beyond the defect complained of in the Complaint.

Mr. Pinto has told me that this will put the American Motors Company out of business. Aside from the fact that I just simply don't believe that whatsoever, that's too bad. If it puts them out of business, maybe they deserve to be put out of business.

Is there anything else you want me to add to what I said before?

(Pause.)

MR. PINTO: Well, you might want to add your previous comments that "Automobile manufacturers are amongst the most devious groups of defendants that you have ever seen."

THE COURT: I certainly adopt that. "Automobile manufacturers are among the most devious groups of defendants that I have ever seen in 21 years on the Bench."

Also, I might add that in the case of at least one automobile manufacturer, it's the only case I can remember in which I entered a Default Judgment for evasiveness and failure to answer interrogatory questions, following which the case was settled for $500,000.

MR. PINTO: Well, we ought to make clear that that doesn't happen to be the defendant here.

THE COURT: It is not the defendant here. It's simply —

MR. PINTO: Although we are being found guilty by association.

THE COURT: No. It's simply in keeping with the assertion that you asked me to make: "That automobile manufacturers are the most devious group of defendants I have ever encountered."

MR. PINTO: No, sir. I didn't ask you to "make" that assertion. I asked you to repeat the assertion that you had previously made.

THE COURT: Which was that.

MR. PINTO: Yes, sir.

THE COURT: Well, then, it's confirming that. All right?

MR. PINTO: Well, there is one problem, Judge. A number of these questions don't deal it seems to me with the issues contained in the Complaint.

There are a number of questions —

THE COURT: I can't help that. I am not going to go over all of them.

MR. PINTO: Well, Your Honor, you —

THE COURT: You have objected to so many of them that are unfounded objections, that I am not going to bother going over all of the other ones that you raise.

MR. PINTO: Well, you pointed out in our discussions here in your comments that you didn't think the first question was appropriate. Now you have ordered us to answer it.

There were other questions that you pointed out some of the subparts were asking for irrelevant information and now we have been ordered to answer them.

THE COURT: No. I have said that you didn't have to answer those.

MR. PINTO: Yes, sir. That's all I can say.

THE COURT: Anything else?

MR. CHERRY: No, sir.

THE COURT: Anything else?

MR. PINTO: No, sir.

THE COURT: Can I help you with your income tax return? "No, sir"?

MR. PINTO: It's going to be fun to get back to income tax returns.

THE COURT: Oh. There is one thing that I do want to make clear, and that is that I do not by my remarks accuse Mr. Pinto personally of any chicanery or of any evasiveness or of any hiding or of any intentional misunderstanding.

My criticisms are leveled entirely at his client, and if as a result of a continued misunderstanding of this sort and a continued evasiveness there is a Default Judgment entered against his client, it will not be the fault of Mr. Pinto, but the fault of American Motors.

MR. PINTO: I think we ought to make clear on the record also that — I do want to add something, Judge, which I just thought of.

It is my position that in my meetings with Mr. Cherry, I had previously requested him to limit his questions concerning design changes to those changes that could reasonably be related to the issues in the plaintiffs' Complaint.

It is my —

THE COURT: There is no need to add that. I have already included that.

MR. PINTO: I understand that, but I think I have to say this, if you will just let me finish, Judge.

I understand you have limited your Order to that extent, but I want to make it clear that had we done that before as a result of meeting with Mr. Cherry, I believe we wouldn't be here today.

MR. CHERRY: Your Honor, may I respond to that?

THE COURT: If you think it's necessary.

MR. CHERRY: Your Honor, that is not the case, and I am very —

THE COURT: No, you can't respond to it.

I am not going to get myself in the middle of a credibility match, and I don't care what you say; I really don't care much about what Mr. Pinto said.

MR. PINTO: May I —

MR. CHERRY: Your Honor, can I just say one thing, without attacking Mr. Pinto's credibility.

When I said, "Why don't you give me the information which you consider relevant," Mr. Pinto's response to me was, "It's not our obligation to write interrogatories for you or rewrite them."

That is my recollection of how our conference went in his office.

THE COURT: Okay. We have both of your recollections on the record, and the Court of Appeals can be the judge of credibility.

MR. PINTO: May I ask a question, Judge?

THE COURT: If it ever gets there.

MR. PINTO: Maybe you can give me some insight as to how you would feel relative to the questions and the way we answer them.

For instance, he has asked us why, any members of the Board of Directors who has left, left.

Now, I suppose in order to answer that, under one view of your Order, we would have to go out and interview each member who left the Board of Directors to find out what their reason was for leaving. Under another view, all we have to do is look at any express reasons they gave and say what we know.

It's very difficult to handle those kinds of things.

(Pause.)

THE COURT: It's "very difficult" to handle modern complex litigation, which is why lawyers make so much more money than judges, and why you have so much trouble filling out your income tax.

MR. PINTO: He used to be a lawyer.

THE COURT: Yes.

MR. PINTO: Okay. I guess you don't want to answer the question.

THE COURT: I have answered it, I thought.

MR. PINTO: Okay.

THE COURT: The answer is, yes, you have got to go out and interview them and find out.

I wouldn't be satisfied with what their expressed reasons were. They may say, "This is what I said, but I really resigned because the damn thing was too unsafe, and I didn't want to be connected with it."

MR. PINTO: Are we also required to give them the names and addresses of all present Board members who haven't resigned? Phone numbers also I think he wants.

THE COURT: No. I don't see any relevance to that.

MR. PINTO: Okay. I think that gives me an idea of how to handle most of the questions then.

Thank you.

THE COURT: Good.

MR. CORCORAN: John Corcoran, Esquire, for the third party defendant.

* * *

(Conference concluded at 3:05 p.m.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EARL L. SHANK and	:	Civil Action
PATRICIA ANN SHANK, Individually,	:	
and PATRICIA ANN SHANK, as	:	
Administratrix of the Estate of	:	
SHERRY LEE SHANK, Deceased	:	
v.	:	
AMERICAN MOTORS CORPORATION,	:	
and	:	
JEEP CORPORATION	:	
and	:	
DONALD PUSEY	:	No. 82-1794
ROBERT TIMOTHY BENNER	:	Civil Action
	:	
v.	:	
JEEP CORPORATION and	:	
AMERICAN MOTORS CORPORATION	:	No. 82-2486

Philadelphia, Pennsylvania
Monday, September 19, 1983
Before HON. JOSEPH S. LORD, III, Chief Judge Emeritus
HEARING: MOTION
CHARLES S. HARPER
OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106

APPEARANCES:

GARLAND D. CHERRY, ESQ.,
214 North Jackson Street
Media, Pennsylvania 19063
for the Plaintiffs.

JOSEPH V. PINTO, ESQ.,
17th Floor - 1234 Market Street
Philadelphia, Pennsylvania 19107
for Defendants AMC and Jeep Corporation

ROBERT E. SLOTA, ESQ.,
801 Old Lancaster Road
Bryn Mawr, Pennsylvania 19010
for Robert Timothy Benner.

PROCEEDINGS

THE COURT: Who is Mr. Slota?

MR. SLOTA: I am, Your Honor.

THE COURT: Don't you even apologize for being a half hour late?

MR. SLOTA: I'm sorry, sir, if I'm a half hour late, Your Honor. I have to assume what Your Honor says is correct. I thought it was scheduled for 3:30 and I do apologize! That's what I have marked down in my book and if I copied it incorrectly from Your Honor's notice I certainly apologize.

THE COURT: Okay.

All right, Mr. Pinto.

MR. PINTO: Good afternoon, Your Honor, may we proceed?

THE COURT: Sure.

MR. PINTO: May it please the Court, as Your Honor I'm sure is aware, we're here in two cases on defendants' motion for recusal.

This case, as you know, has been very thoroughly briefed on these issues and I'm not going to go into all of the details here, nor do I believe that the argument on

the motion for recusal requires a discussion of the various discovery disputes which we have which exist and which will —

THE COURT: I do think so, because any bias, if there was any bias or prejudice, was formed as a result of your tactics during discovery.

MR. PINTO: Well, sir, I would say, Your Honor, pointing to the affidavit of Gerald Davis concerning the arguments that occurred on December 9th of 1982, I believe it was, when you had a hearing on defendants' motion to transfer, Mr. Anders in his affidavit has affirmed Your Honor's comment made at that hearing which were not part of the transcript.

THE COURT: That's right.

MR. PINTO: But nevertheless, Mr. Anders asserts that they were made off the record and the assertions that Mr. Anders made were substantially the same comments Your Honor made at the conference on discovery in the Shank matter. Now those comments were made before any discovery issues in these cases were before Your Honor.

THE COURT: Oh, no.

MR. PINTO: Yes, sir, I think so. The first discovery motion had not yet been filed.

THE COURT: On July the 2nd of 1982 the plaintiffs sent their first set of interrogatories to defense counsel.

MR. PINTO: Correct, sir.

THE COURT: Well, that was certainly before December 9th.

MR. PINTO: Well, sir, what I said was there were no motions before Your Honor concerning discovery.

THE COURT: On August 17, 1982 defendant's counsel requested and was granted an extension of 30 days to answer the interrogatories.

On September 23, 1982, which was more than 30 days, defense counsel was granted a second 30-day ex-

tension, and then when the defendants filed their answers on October the 1st, 1982 you objected to or allegedly found yourself unable to respond to approximately 70 percent of the interrogatories.

MR. PINTO: Yes, sir, but no motions were filed relative to that discovery until after the December —

THE COURT: No, but discovery was plain. The discovery was evasive. It was stonewalling and it was in my opinion very insincere.

MR. PINTO: If Your Honor please, I believe the discovery you are speaking about was in the Shank case.

THE COURT: I'm thinking about both cases.

MR. PINTO: I understand that, Your Honor, but the discovery history that you just related was in the Shank case, not in the Benner case. The matter before Your Honor on December 9th was the motion to transfer the Benner case.

THE COURT: I know.

MR. PINTO: And there were no issues concerning discovery in the Benner case.

THE COURT: No, I'm not saying there were in that case.

MR. PINTO: Well, do I understand that what Your Honor is telling me is that you reviewed the questions and answers prior to the December 9th argument and for that reason formulated the opinion that you had of automobile manufacturers which was expressed on December 9th?

THE COURT: No, Mr. Pinto, I don't know what you understand, if anything. Only you know what you understand.

MR. PINTO: Yes, sir.

THE COURT: But the point is that I had seen the history. I had seen the delay on the part of the defendants beginning in July of 1982.

MR. PINTO: I take it then, Your Honor, that you had made that decision without hearing from the defendant at all about what the responses meant, what the

problems were. We hadn't had an opportunity to be heard on any of these issues by December 9th when the motion for transfer was heard before Your Honor and according to Mr. Anders, who made those comments relating to that motion —

THE COURT: Well, you don't complain about that, do you?

MR. PINTO: Well, sir, I point back to —

THE COURT: You got your extensions that you asked for.

MR. PINTO: I agree with that, Your Honor. What we are here on today is the motion for recusal based upon comments by Your Honor in the two cases. We believe that Sections 144 and 455 of Title 28 are directly in point relating to your comments.

Now I believe what Your Honor said was that automobile manufacturers are among the most devious group of defendants that you have ever seen in 21 years on the bench, and I'm quoting directly now from the comments made at the Shank conference in April.

THE COURT: Oh, yes, by that time, of course, I had had a chance —

MR. PINTO: You had at that point had the discovery issues in front of Your Honor.

THE COURT: Also in the case of at least one auto manufacturer. It's the only case I can remember in which I entered a default judgment for evasiveness and failure to answer interrogatories following which the case was settled for $500,000.

MR. PINTO: Now as I understand what Your Honor is telling me today that the formulation of these thoughts came about possibly because of the discovery dispute that had been in front of Your Honor prior to that time, but pointing back to the argument in Benner the same comments were made — substantially the same comments were made before there were any discovery issues in front of Your Honor and before we had an opportunity to be heard on them. So what we are really say-

ing is that you made the comments prior to reviewing substantially the discovery issues and coming to any determination concerning what was happening with interrogatories and answers on the discovery issue and for that reason we believe that on its face our request and affidavits require that you take a hard look at the case under Section 144.

Now the cases interpreting Section 144 make it very plain, assuming timeliness — and that's another issue that the opponents have raised and I can get to that — assuming timeliness and the legal sufficiency of the affidavit — legal sufficiency without getting into whether or not it's correct even —

THE COURT: Oh, I'm not permitted to deny it?

MR. PINTO: If it's legally sufficient I think that's correct, Your Honor.

Now there isn't any question — I think that you made the comments in April and, of course, —

THE COURT: No question.

MR. PINTO: — the affidavit alleges that you made it in December. We believe that if in fact that it is not only correct but if the assertion is there that you made the comments in December, then the information that formulated those comments had to have come from somewhere other than these two cases.

THE COURT: No, I'm reminded we had your answers before December 9th.

MR. PINTO: Yes, sir, that is correct, they were filed with the Court.

THE COURT: That's right, we had your evasive answers.

MR. PINTO: If you had made a decision that they were evasive without allowing us to even brief the matter and be heard on it, that further reinforces our argument.

THE COURT: Hardly not when they're evasive on their face, when they're so plainly evasive that I don't feel I need a brief or an argument.

MR. PINTO: Well, —

THE COURT: And secondly, at the December 9th conference there was discovery discussion.

MR. PINTO: Well, if I remember correctly, Your Honor, Mr. Slota for the first time handed you a motion relating to the discovery, which, according to Mr. Anders, you were going to sign on the spot without giving us an opportunity to be heard on it.

Now again that's part of Mr. Anders' affidavit. I wasn't a witness. I wasn't present.

THE COURT: Was he here?

MR. PINTO: Is he here today, Your Honor? No, he is not.

THE COURT: No, was he here for the December 9th conference?

MR. PINTO: Yes, sir, that, if you will remember, was the motion to transfer the case.

THE COURT: Yes, I know it was a motion to transfer it to Utah.

MR. PINTO: That is correct. Now, I know Your Honor didn't feel very kindly about our motion and you felt that it was an inhumane motion.

THE COURT: I certainly did. I thought it was absolutely inhumane.

MR. PINTO: But I think—

THE COURT: And insincere.

MR. PINTO: I think it may have been malpractice not to have filed the motion requesting the transfer, as much as Your Honor might have felt it was inhumane.

There are probably nine witnesses whose testimony will have to be given to a jury by way of depositions because we can't transfer the case. The jury is going to have no idea what these witnesses are all about or how sincere they are. They are going to get a faceless reading of transcripts.

THE COURT: Not if you bring them here or take video depositions.

MR. PINTO: We have no right to bring them here unless they acquiesce and agree to come.

THE COURT: Yes, that's true.

MR. PINTO: Secondly, I have had experience with videotaped depositions, Your Honor, and I find them personally to be very difficult for a jury to sit through. They are almost as bad as the reading of transcripts.

THE COURT: What's in my mind, Mr. Pinto, you had a case of a machine with an alleged defective gasoline gauge where you had videotaped depositions for the jury and won the case.

MR. PINTO: I don't recall that, sir, but I have had cases that I have tried in the Eastern District where videotapes were used extensively and that's the basis of what I'm telling you. I felt, and the jury told us afterwards, that the use of videotape was the most boring thing they ever had to sit through.

Now I hasten to point out to Your Honor that we are not here, nor can we understand the cases as I read them to, come to a decision concerning the merits of the affidavit. I think we have to, in making the decision that this Court is going to make, accept the affidavit for what it says.

Secondly, going further, and it's very difficult to interpret 144 and 455 without reading a lot of the cases, but it seems to me that 455 complements 144 and goes much further and requires the Court itself to recuse itself when a reasonable person hearing all the facts would question, not decide what the statute says, but question the impartiality of the Court.

THE COURT: Of course that would have to be in light of the fact there was any bias or — well, any bias would have to be formed extra-judicially.

MR. PINTO: Yes, sir, I hope you understand this is one of the most difficult things that I have ever done coming down here and arguing this motion.

THE COURT: Oh, I can understand that.

MR. PINTO: It is not an easy thing, but I have to do what I think is right representing my client.

THE COURT: Sure.

MR. PINTO: You and I have been through — we have had a lot of cases together. I have tried cases in front of Your Honor and I have never had an experience that I could relate to this case and I say, Your Honor, you are not a partial judge because that has not been the cases I have tried, including cases for automobile manufacturers. I want you to understand that, but in this case I'm of the sincere opinion that a reasonable person looking at all the facts in this case, and especially what Your Honor has stated, would come to the conclusion that there is at least a question of whether or not the Court could be impartial.

THE COURT: Are you familiar with the case of Phillips against the Joint Legislative Commission?

MR. PINTO: I am afraid I'm not, Your Honor.

THE COURT: Let me read you what they say in that matter.

MR. PINTO: May I ask the citation so I can read it when we are finished?

THE COURT: Sure, 637 F. 2d 144 at Page 1020, Fifth Circuit 1981, in which the Court says:

"A motion for disqualification ordinarily may not be predicated on the Judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench."

MR. PINTO: May I respond to that, sir?

THE COURT: That's why I asked you about it.

MR. PINTO: I don't know that this is the law in this Circuit and —

THE COURT: Do you know that it isn't?

MR. PINTO: No, sir, but I would question it. I believe that it is — if Your Honor pleases, as an example —

THE COURT: In this Circuit, and excuse me for interrupting you, it is clear that a claim of bias or prejudice based on judicial knowledge gained from prior hearings or other cases is not sufficient grounds for disqualification.

MR. PINTO: I would agree with that, Your Honor.

THE COURT: Well, —

MR. PINTO: It is not the prior judicial knowledge, Your Honor, at all, it's the comment. It's the comment and I would suggest to Your Honor that if you were sitting, for instance, on a murder trial and heard evidence in the case and then said out of the hearing of the jury, perhaps, but in front of everyone else, "The defendant is a scum and I hope he gets what he deserves," even though the evidence would certainly indicate that he should, I think counsel would properly request you to recuse yourself prior to the case going to the jury.

THE COURT: I disagree, not if that impression was formed prior to the evidence in the case.

MR. PINTO: That is a doubtful question that I have in my mind, but I believe in our case that your opinion, as you have stated, came from not what you heard in this case but from your experience at least in one other case with another party that didn't have anything to do with this litigation.

THE COURT: Oh, it did have plenty to do with this litigation.

MR. PINTO: Well, Your Honor, there is not a conspiracy among auto defendants to frustrate —

THE COURT: I'm not sure of that.

MR. PINTO: Well, I worked with them. I can assure you that if there is a conspiracy I don't know anything about it.

THE COURT: Well, I'm not claiming that you are an unindicted co-conspirator.

MR. PINTO: I think if there was a conspiracy to frustrate plaintiffs it would almost be necessary for counsel of record to be part of it, and if Your Honor agrees with me that the basis for your comments came from knowledge relating to another party in other cases, then I'm more firm in my belief that you should recuse yourself and that what happened in this case was not a basis for the comments that you made.

THE COURT: Well, you predicated that, if I agree with you and I don't agree with you, that it came from this case and perhaps from other cases as well.

MR. PINTO: And, Your Honor, if I may in closing, I would like to quote from an article in the Harvard Law Review which appeared quite some time ago on this problem, and in case you haven't had a chance to look at the disqualification of judges and justices of the Federal Court — I will get you the page. 757 is the page I'm quoting from:

> "Disqualification is appropriate not only when the judge appears to have a special interest in the outcome of the merits," of course that isn't the case, "but also when his prior experience with issues involved in the case raises doubts with his ability to hear both sides with an open mind. This prior experience may consist merely of contact with the facts of the case, or it may actually include expressions of opinion on the merits. In any event, the judge may appear to have prejudged the resolution of the case and to be unable to approach the case from an impartial and detached posture."

THE COURT: Now what I have said did it give any indication that I have prejudged the case?

MR. PINTO: Well, I think it gave an indication that you might prejudge some of the discovery issues, for instance, that come before Your Honor which are very serious issues to my client.

THE COURT: Oh, yes, I realize that, especially in light of the fact your client wrote to the National Safety Administration and your answers to the interrogatories —

MR. PINTO: Well, Your Honor, you requested — I wanted to try to avoid getting into this, but if you carefully read the entire letter and not just the quoted sections —

THE COURT: I read the entire letter carefully.

MR. PINTO: — you will see the entire letter makes it quite clear what they are saying, and —

THE COURT: It makes it quite clear what tendency to roll over means, and your answers to the interrogatories said that it had no defined meaning.

MR. PINTO: No, it made it quite clear that they were answering a docket request by the Government, telling the National Highway Safety Administration in this letter that there is no known task to weighing, quote, tendency to overturn, and if you read the — I'm sure you have read it very carefully, but I think I would nevertheless like to go back to the letter.

The particular section quoted by Mr. Cherry:

> "This means that on an absolute grading scale it is likely that the inherent tendency for rollover would be greater than that of a typical passenger car. This is not to say, however, that these vehicles present any greater risk of rollover than a passenger car, and this is supported by the available crash data cited above."

THE COURT: Sure, that doesn't alter my thinking when you say in your answer to the interrogatory:

> "The term tendency to rollover is not a term that is in common usage in the automotive engineering field and does not have an established meaning or definition."

MR. PINTO: That is exactly correct and I will stand by that. I have been in enough of these cases to know that that —

THE COURT: But that is not what was said in this letter.

What was said in this letter — never mind what Mr. Cherry quoted. This is from the letter which says, "An investigation of vehicle crash data indicates that in general vehicles do not roll over due to an inherent tendency toward rollover in the vehicle itself, but rather the rollover is a result of leaving the highway."

MR. PINTO: That's correct.

THE COURT: They didn't have any trouble answering that. They didn't say, "We can't define rollover."

MR. PINTO: They were responding to the words used by the Government in saying that there is no —

THE COURT: Where are the words used by the Government?

MR. PINTO: In the docket request.

THE COURT: Yes, the docket request did not use the word tendency to roll over. It used rollover resistance.

MR. PINTO: Well. I'm looking at it and I see the words "rollover tendencies," and that's the docket.

THE COURT: Well, I don't have the benefit of that.

MR. PINTO: Well, I would be happy to let Your Honor have a copy of it.

THE COURT: I don't need it.

MR. PINTO: And we were using the Government's — my client was using the Government's words when it responded.

THE COURT: Why don't you use the plaintiffs' words in this case?

MR. PINTO: Because, Your Honor, we don't know what they're talking about.

THE COURT: But you knew what the Government was talking about.

MR. PINTO: We said in general vehicles do not roll over due to any inherent tendency towards rollover.

THE COURT: Right.

MR. PINTO: We are saying that is not a factor in rollover accidents that we know of.

THE COURT: You used the term tendency to roll over eleven times in these letters without ever saying that "It has no defined meaning and we can't answer it."

Eleven times you used it.

MR. PINTO: Well, the letter says we're telling you that it is not a, quote, tendency to roll over that is causing accidents and therefore —

THE COURT: They say it is likely that the inherent tendency for rollover would be greater than that of a typical passenger car.

MR. PINTO: Well, if you read what we say earlier we say, "Look, the same thing applies to trucks. Trucks would have a greater tendency to roll over than a passenger car."

THE COURT: Well, then you do know what rollover means, tendency to roll over.

MR. PINTO: It is not defined, Your Honor, that's what I'm trying to say to you.

THE COURT: Okay, these are the kinds of answers that I have been getting in the interrogatories, weaseling and evasive.

MR. PINTO: If you will look at the interrogatories and the answers that you call weaseling and evasive, the one that asks about numbers — it deals with numbers, not a definition of tendency to roll over. Look at the specific question.

THE COURT: Yes, I will.

"Does the defendant recognize that the 1975 Jeep CJ5 vehicle have a greater tendency to roll over or overturn than its ordinary automobile?"

They don't ask for any numbers.

MR. PINTO: Okay, well, do they have a greater tendency to roll over.

THE COURT: They don't ask for any numbers.

MR. PINTO: You are dealing with it out of context.

THE COURT: Okay, Mr. Pinto, go ahead. Do you have anything further?

MR. PINTO: Your Honor, I knew if we got into the discovery issues, and I came here prepared to argue the motion for recusal, I was going to get myself into trouble because I spent no time preparing to argue discovery issues.

THE COURT: Well, it's too bad you didn't.

MR. PINTO: And all I can say, Your Honor, is with all things considered the parties in this case I sincerely

believe in the long run they're going to be better off, if this case is tried, if Your Honor grants the recusal motion.

Thank you.

THE COURT: There is one thing I want to ask you before you sit down.

I want to ask you about the timeliness of the affidavit.

MR. PINTO: Yes, sir.

The affidavit — well, first of all, I think there are two cases discussing timeliness.

THE COURT: Oh, there are. They say an application is untimely when an affiant significantly invokes participation by the Court in pretrial motions or other judicial proceedings between the time he first learned of the asserted prejudice and at the time the 144 motion was filed.

MR. PINTO: Well, Your Honor, when we decided that we had to file the motion after the April conference in —

THE COURT: You knew about it in December, you say.

MR. PINTO: Yes, it was related to me by Mr. Anders as to what took place in December. That's correct. We decided that we would avoid trying to file the motion until it happened again in Shank. In another case where we were before Your Honor it happened again and we decided we had no choice but to —

THE COURT: And that took six months.

MR. PINTO: No, sir, the motion was filed within two weeks of your getting the transcript. We immediately ordered the transcript from the Court Reporter so that we could be sure about the ground that we were proceeding upon. We wanted the transcript. I called the Court Reporter and he said he would get it to me as soon as possible and shortly after we got it we filed our motion. That was in June.

THE COURT: In the six-month period in the Shank case you participated affirmatively and invoked participation of the Court five times.

MR. PINTO: Any time after you made the comments and —

THE COURT: Yes, after April the 15th.

MR. PINTO: — I wrote to Your Honor requesting that you withhold ruling on any motion specifically until this issue was heard.

THE COURT: No, excuse me, it was after December the 9th that you invoked the participation of this Court.

MR. PINTO: I'd have to look. You have the advantage on me because your clerk is preparing all these notes and giving you the information. If he would give me the same information perhaps I could respond to it.

THE COURT: Give it to Mr. Pinto. Just give him what you gave me. That's all he wants.

(Handed.)

MR. PINTO: All it says, "After December 9th." Excuse me, Your Honor, that is not much help. I don't know what you are talking about, honestly.

THE COURT: What I'm talking about is the fact that even after you knew or thought you knew of the alleged bias you affirmatively invoked participation of this Court eleven times I think in one case and five times in the other case.

MR. PINTO: We did not affirmatively request this Court to rule on anything after the April meeting in Shank to file our motion for recusal. To the contrary, I wrote to the Court asking you not to render any decisions because I believed that it would affect adversely our position on the motion to recuse.

THE COURT: Well, let's see what you did. You moved for discovery conference. You moved to compel an inspection of the vehicle described in the plaintiffs' complaint, and at the same time you moved for protective order, which is being very frank and open in discov-

ery, and you moved for protective order to preclude discovery of information obtained as a result of the inspection.

You filed a praecipe to withdraw a previous motion. You participated in a discovery conference. You filed an answer to the plaintiffs' amended complaint. you answered four motions or requests filed by the plaintiff. You filed supplemental interrogatories. You filed three sets of answers and objections to the plaintiffs' interrogatories and two notices of depositions.

MR. PINTO: Your Honor, I don't believe that filing notices of depositions or answers to interrogatories or an answer to a complaint in any way should affect, however, this Court's decision on a motion for recusal.

THE COURT: Well, you may not think so but the Courts do.

MR. PINTO: Well, we're in danger of suffering a default judgment if we don't file an answer, Your Honor.

THE COURT: No, you could file motion for recusal.

MR. PINTO: Well, I think I answered the Court and said we decided not to do it.

THE COURT: That's up to you. If you want to decide —

MR. PINTO: But then when the same issues arose in the Shank case in April we found that we could no longer restrain ourselves. We had to do it.

THE COURT: That's a value judgment that you made and that is not my concern.

MR. PINTO: Well, sir, there are cases which indicate that — and I will see if I can quote it. Perhaps Your Honor ought to consider that under all the circumstances in the case if it is determined that the motion for recusal is not filed solely for the purpose of delay, then the Court should consider it as timely filed.

Now I don't see how in light of everything that's happened here anybody could honestly say that we filed this motion solely for purposes of delay.

THE COURT: Well, practically everything you've done so far has been for the purpose of delay.

MR. PINTO: I disagree with Your Honor.

THE COURT: What?

MR. PINTO: I disagree with Your Honor and I think you should know that and that's why I said it. I don't mean to be disrespectful, but I think I have to note my disagreement with that comment on the record.

Thank you, sir.

THE COURT: All right, I will hear counsel.

MR. CHERRY: Your Honor, do you have any preference as to who you would like to hear from first?

THE COURT: No.

MR. CHERRY: Your Honor, I think our position has been adequately stated in our response to the motion that was filed by Mr. Pinto and I think in previous conferences we've gone over this over and over again.

One thing that disturbs me I guess as much as anything else in this case is the fact that once the Court does resolve this motion I'm wondering just how the Court is going to get AMC Jeep to cooperate in discovery proceedings regardless who the judge is, because it appears to me that somewhere along the line a conscious decision has been made by this corporation that it will be worse off disclosing requested information than it will be refusing to cooperate in discovery proceedings and suffering whatever sanctions might be appropriate.

THE COURT: Such as a default judgment.

MR. CHERRY: Such as a default judgment or certain adverse rulings, whatever would possibly be appropriate.

THE COURT: Well, you shouldn't worry about that. If you get a default judgment all you have to do is prove damages.

MR. CHERRY: Yes, sir, that's correct, but there is what I consider to be a viable punitive damages claim here and inevitably their refusal to disclose information which is vital to a punitive damages claim is going to

affect our ability to win damages against this corporation.

They have not only been totally uncooperative in our first set of interrogatories — and we had a very full discussion of what they were doing and what we were doing on April 15th and what should be done and I thought the Court bent over backwards to be fair at that time, giving Mr. Pinto and his client an opportunity to go back and to come back with more sincere answers, and 53 days after that conference it seems to me that Mr. Pinto's client was in the untenable position of being faced with a contempt citation.

They filed a motion to recuse Your Honor and now they would suggest to the Court that it was timely filed, even though more than six months had elapsed since some of the allegedly prejudicial remarks had been made by Your Honor. Since that time Plaintiff Shank has submitted two more sets of interrogatories and we continue to be stonewalled.

It appears that the defendant has developed a very centralized defense strategy on how to handle these cases. There is certain information which they will disclose; there is certain information which they will not disclose, and the door remains shut and I'm not sure that any court in this country has been successful to date in getting that door opened.

The defendant would have the Court believe in looking at answers to interrogatories that — well, for instance, it denies knowledge — it has consistently denied knowledge of basic engineering data, basic engineering terms. It has denied performing elementary analyses on the vehicle in question.

THE COURT: Maybe that's why they turn over so easy because they don't know about these things.

MR. CHERRY: They state repeatedly that the vehicle is designed — or at least they imply that the vehicle is designed on an ad hoc word-of-mouth procedure which results in the drafting of thousands of drones and parts

specifications, et cetera, and all of this is done without any written communication from test drivers and engineers, and this is the type of information that I would consider valuable not only on the issue of liability but on the issue of punitive damages.

What notice do these people have? Are they making a conscious decision to put on the market and to sell to the public a product which isn't capable of hurting consumers?

They deny knowledge of characteristics, basic characteristics of suspension components, for example.

THE COURT: Didn't the Government just have a similar experience with General Motors?

MR. CHERRY: I don't know, sir.

THE COURT: Concealing information about the brake reaction.

MR. CHERRY: I have no knowledge of that, Your Honor, but it's very possible. I guess my real concern in this case is that I don't know that this Court will be successful in the final analysis in getting those doors open because I think that AMC Jeep believes that keep the doors shut regardless, even if we got to suffer a default judgment, because once the information is out then, of course, we've got to contend with that information across the board with respect to many other cases.

It seems to me that AMC Jeep was clearly in contempt of this Court when it filed the motion to recuse. They made no attempt whatsoever, even a token attempt, to comply with Your Honor's verbal order given in chambers on April 15, 1983, and a week or so after that conference in the interest of trying to expedite this litigation I telephoned — excuse me, I wrote a letter to Mr. Pinto saying, "Look, under the circumstances I'm not interested in getting the upper hand on you procedurally or anything else. Let's just get down to the merits of this thing and let's try to get this information."

And I also said in the letter, "Can we meet?" Even though I realized at that time I may be prejudicing my-

self, opening the door for them to say, "Well, Cherry delayed it. Cherry suggested it." Perhaps your order was not controlling at that point and a week after I wrote the letter suggesting perhaps another meeting to resolve some questions would be appropriate.

I get a letter back from Mr. Pinto in vague terms saying, "Of course I will cooperate in whatever effort you want to undertake."

I immediately telephoned his office, this is on May 29th, and I'm told — my secretary is told by his secretary, "I'm sorry, he will not be available for this week. Maybe some time in the future when he gets back from his seminar."

Now I understand Mr. Pinto is a busy man and all of that, but the point is it appears to me that this corporation and this defendant have no interest whatsoever, and regardless of what this Court orders and what it says it is — and there are certain decisions that have been made before this case was instituted and they're not going to budge as far as the timeliness of this affidavit is concerned. I think that that's something that needs no comment from me at this time. I think that the sincerity of this litigant has to be thought about very carefully. I think that what the defendant is attempting to do here is to try to shift the emphasis away from its own conduct.

The fact of the matter is the order which you entered on April 15, 1983 there has been not even a meager attempt, not a scintilla of an effort to comply with that order, not even to go through the interrogatories and to say, "Well, maybe there were a half dozen or so interrogatories where we were clearly out of bounds where we should not have objected and so we'll at least make an effort to answer those interrogatories," nothing, and we sent a second set of interrogatories and it doesn't require much of a review to see that it's the same thing.

It almost seems like the answers are being printed on a mag card to a lot of these questions and now a third

set of interrogatories and it's absolutely — I guess the thing that stands out in my mind more than anything else, they would have us believe and the Court believe that they have no internal written documents whatsoever relating to design changes, design modifications, no written feedback whatsoever from test engineers, test drivers, routine questions like "Identify your test drivers."

Now just to give the Court an example — and I'm talking about the second set of interrogatories now — refusal to identify trade journals that they subscribe to; refusal to identify trade organizations that they belong to; refusal to identify test drivers; refusal to identify any rollover problem that may have been reported by any test driver or engineer; refusal to disclose how AMC monitors its field history of its product; refusal to give information relating to the tire test which they performed; refusal to identify the advertising manager who has given testimony for the company.

Now Mr. Pinto alleges that Your Honor had formed an opinion about the conduct of AMC Jeep prior to the Benner conference in December, 1982. I was not even aware there was another case that Your Honor was handling involving this defendant until after the Shank conference took place on April 15th, but the interrogatories — the first set of interrogatories that we filed in the Shank case were answered, what I would consider grossly, insufficiently, evasive, stonewalling, the whole thing, and I wrote a letter to the Court in November bringing to the Court's attention that this had occurred and asking that a discovery conference be scheduled because the lack of cooperation was so pervasive. It seemed like an enormous task to take each interrogatory, to argue it and so forth, and I believe that your law clerk asked for a discovery conference some time in December and Mr. Pinto responded by writing Your Honor a letter and as a result of that I presume the conference was canceled.

THE COURT: I forgot to mention that in some of the interrogatories the defendants, rather than answer the questions to the extent possible, declined to answer the questions entirely, claiming that they were vague, irrelevant, overbroad and burdensome and they needed two extensions —

MR. CHERRY: That is correct, sir.

THE COURT: — in order to come to that conclusion.

MR. CHERRY: And, Your Honor, on the second extension we were specifically told that the reason why they needed the second extension was because the information is so technical and it requires so much time and so forth, and I believe that's even reflected in the stipulation. And then after two extensions to submit answers which were so unsatisfactory and so clearly showed an intent not to cooperate, my response was to request a discovery conference immediately.

Mr. Pinto requested, however, the discovery conference was scheduled but canceled. We eventually had a conference in January. At that time I again said, "Your Honor, I just have a very strong feeling these people have no intention of cooperating," and Your Honor indicated that you had no indication of that at that time and they should be given an opportunity to respond to discovery in a normal manner and so forth.

You instructed me to file a motion to compel, if I thought it would be appropriate, and a hearing to compel took place on April 15th and at that time it seems to me — my recollection of that conference is that you attempted to coax Mr. Pinto into going back to his client and say, "Look, you are going to have to get them to cooperate. Our rules require more than this," and I got the impression Mr. Pinto was saying, "This is it, you are not getting any more," and it was following that type of dialogue between yourself and Mr. Pinto that things heated up somewhat and some things were said on the record.

According to my research the bias or prejudice which is alleged must come from extrajudicial source and must result in and on the merits on some basis other than what the judge learned from his participation in the case.

As AMC sits here today it has been months since you've ordered them to answer interrogatories. How they could possibly contend here today that some bias or prejudice exists against them, and it's from an extrajudicial source, is beyond me, Your Honor, considering their own conduct in this litigation. In fact, to date you have yet to enter any kind of sanctions against them.

I fully intend, depending upon the outcome of this motion — whoever is going to be the judge that's going to try this case — I fully intend to file a motion to compel answers to subsequent sets of interrogatories, any motion for sanctions.

I can see why Mr. Pinto is emphasizing so much the appearance of bias in this case. I think he's steering away from saying there is actual bias because I think he knows better. I think he realizes the Court has bent over backwards to be understanding, to give them a chance, and I think they're quite alarmed that Your Honor may be taking a no-nonsense approach to this litigation and saying, "I don't care what you are getting away with elsewhere, this is my courtroom and you are going to obey the discovery rules as long as you are in my courtroom," and I can see why Mr. Pinto and his client would be very anxious to get this case out of your courtroom.

That is all I have, Your Honor.

THE COURT: Thank you. Do you have anything to add, Mr. Slota?

MR. SLOTA: A few things, Your Honor.

THE COURT: Don't be repetitive.

MR. SLOTA: No, sir, I will not.

At the risk of being repetitive on one issue, though, I want to apologize again. I certainly meant no disrespect to the Court.

THE COURT: I accept that.

MR. SLOTA: Thank you.

It's uncharacteristic of me. I'm late for everything but two things, airplanes and court dates, and I really feel badly I was late for this one, and again I assure you I had a mix-up on the schedule.

THE COURT: You have one commitment, not to be late for your funeral. You won't be late for that.

MR. SLOTA: I hope it is not too soon.

THE COURT: I hope it is not. I hope you don't have to rush.

MR. SLOTA: Your Honor, I did want to make one point on the overall issue. I guess it kind of goes to the good faith and the defendants' reliance, apparent reliance upon the Shapp case which they cite.

It frankly is incredible to me that the Third Circuit Court of Appeals, or the Congress of this country, intended the result which they insist that case compels, to wit, that an affidavit filed by Miss Burns, who was not present when the alleged prejudicial remark took place, must be taken on its face in disregard of everything else that they have done in this case, where the whole issue so far before Your Honor has been a record replete with questions concerning their good faith, and they come to this court on this recusal motion and say, "You have to believe what we said," what this lady out in Detroit puts down in her affidavit concerning the events which took place in your courtroom about which she has no personal knowledge.

I don't believe that you can stretch the Shapp case or any other case so far as to say that. I think that the issue of this defendant's good faith throughout the proceedings must permeate the Court's decision on the recusal motion, except if you decide the recusal motion on the merits of that affidavit, which I think you might.

As I read the cases, Your Honor, — and the Trueblood case coming out of this circuit I think is am-

ple support for the proposition that what Your Honor says by way of a ruling on a matter which is before him cannot be grounds for a recusal motion.

And not only the Trueblood case but Smith versus Danue says that as well, and therefore I don't see how anybody can escape the conclusion that what you said was in the context of a ruling. Obviously you said it in the context of a ruling.

I wasn't present during the Shank case, but what was transcribed, Your Honor's comments on the record — and Mr. Pinto clearly demonstrates that what you said was in the context of a ruling with respect to this defendant's conduct and with respect to the Benner case.

If I may respectfully refresh Your Honor's recollection, you were corrent when you suggested to Mr. Pinto that the matter had been before you. What I handed to you at the conclusion of the discussion of the motion to transfer venue was the plaintiff Timmy Benner's motion to compel discovery.

What happened was during a pretrial conference in chambers when the issue of discovery was broached, they promised to get the answers to interrogatories in. They filed answers to interrogatories, which in effect were not answers but were evasions and refusals to answer, but apparently — well, I can't understand why, but Your Honor dismissed the motion, therefore, as moot because answers had been filed, and what I filed was a motion saying, "I don't believe that is amiably dismissed. It's moot because they in fact did not answer the questions."

We now have our third motion. That one has not been disposed of yet, Your Honor, unfortunately, and we have our third motion, plus their motion to try to prevent me from taking the deposition of their people. Those are all before the Court.

What I'm suggesting is that the cases don't permit the recusal motion to be based upon what you said after the December 9th hearing off the record.

Incidentally, Mr. Anders was here and had the same privilege. As a matter of fact, I believe the court reporter was here during that — obviously he was here because he transcribed the testimony of Mr. Benner.

You will recall we had a hearing, as Your Honor's notice required, and had he objected to something that you said he certainly could have availed himself of the opportunity to put it on the record at that time. And that, of course, goes to the timeliness, and I counted the same number of applications to the Court for relief as you did. We went back and forth a number of times with the defendant asking for relief, and the point which Your Honor raised I believe is an absolute crucial and valid one with respect to the timeliness of the motion, although I'm frank to tell you that I don't think that this motion is appropriately confined to a procedural deficiency. I think that it's so gross that perhaps Your Honor might want to rule on the merits, notwithstanding the timeliness of the application.

I want to just make one other point and that is with respect to going back to this good faith issue. If Your Honor can't simply dispose of this motion by following the cases which say that your comments in the course of rulings on this case cannot be the basis for recusal motions, then I think it's appropriate to get into the issue of the defendants' good faith.

I filed a supplemental answer with attached affidavits from other lawyers before this motion was filed. I was unaware of it. I have since had an opportunity to talk to other lawyers.

Of my certain knowledge there are over 400 cases extant in the United States today against the American Motors Corporation and the Jeep Corporation, or either one of them, based upon precisely the design defect theory that's extant in both the Shank and the Benner cases, and the few lawyers, I would say perhaps a dozen that I have talked to who were involved in those cases, have uniformly had the same problems.

Your Honor will see in the affidavits which I filed that one lawyer swears that American Motors deliberately perjured itself in response to discovery requests. Another lawyer swears they perjured themselves insofar as they refused to even acknowledge that they knew of this problem, when in fact they did, and on the basis of his affidavit the Court in which he had started suit and then subsequently dismissed it based upon the sworn responses to interrogatories filed by the defendants, which he later found to be false, reopened that suit.

THE COURT: Was that in Wisconsin?

MR. SLOTA: I don't recall where it was.

THE COURT: All right.

MR. SLOTA: It's in the affidavit which I filed with my supplemental answer. If Your Honor wishes I can find it.

In this case there are a couple of things that strike me, one of which was — there are many, many evasions, but one of the things I asked him was to identify occupant ejection tests and they filed supplemental answers denying any knowledge of such tests.

I met a lawyer about a month and a half ago who told me that he has film, that as a consequence of an action in Michigan he finally got ahold of videotape showing crashes which they did with dummies strapped in — seat belted in these various types of vehicles that are involved in this test, obviously occupant ejection material.

There is another case, one that's very close to this one in proximity. It's one of several cases.

THE COURT: Excuse me.

(Discussion off the record.)

Yes?

MR. SLOTA: One of several cases wherein an attorney from the South — his name is Galbraith, E. C. Galbraith. He represents multiple plaintiffs in actions against American Motors arising out of Jeep rollovers, and this case is the Hermsdorfer case, and I have the citation, Your Honor, which is in the Middle District. It's

Civil Action Number 81-0383, and there the issue was the notice of taking of depositions of witnesses identified finally by American Motors.

Mr. Galbraith traveled all over the country in — I should say all over the East Coast in furtherance of his notices to have those people deposed after a District Court judge in Detroit had ordered them to be deposed, and in the various jurisdictions to which he traveled American Motors accomplished — the refusal of these very witnesses who had been ordered by another judge to testify, had accomplished their failure to appear, and the issue which is before the Federal Court is what sanctions will be imposed upon American Motors for that deliberate flaunting of Judge — I think it's Judge Cohen in Michigan. I can get ahold of that material if Your Honor thinks it's appropriate.

I say this only by way of illustration, that again we have a record which is replete with the bad faith and certain questions concerning the good faith of the defendant in this case, and on that issue it seems incredible that we should say Your Honor's hands are tied, that you have to accept an affidavit and you cannot go beyond and look at the issue of good faith in their attempt to recuse you from this case.

Thank you, sir.

MR. PINTO: May I be heard briefly, Your Honor?

THE COURT: Yes.

MR. PINTO: I think what I have just heard is a good example of why these proceedings couldn't possibly try the good faith throughout the country of American Motors Corporation. I have had the opportunity to know that he was going to go into the Hermsdorfer case. Miss Burns, who is sitting beside me, told me that's absolutely incorrect in what he's saying. The facts are erroneous in what they're relating here and it's impossible for me to come before this Court to allow this kind of mud-slinging to go on and respond accurately when I don't know anything about this case, and before we get

into them if we are going to try American Motors here I ought to have an opportunity to look into them and meet what they are saying.

THE COURT: No, I'm not going to consider that. I don't think it has anything to do with this case.

MR. PINTO: Fine, Your Honor, that's good.

Secondly, in response to something that I said in my argument, Your Honor said, I believe, "I haven't decided this case, I haven't prejudged it," and I wrote down something you said during the argument. The question you asked was, "Is that why they turn over so easily?"

THE COURT: Yes, I meant that, of course, sarcastically.

MR. PINTO: Yes, sir.

THE COURT: Since you didn't have any information — according to your answers you didn't have any written information on the tests or anything else. Maybe that is why they turn over so easily.

MR. PINTO: To ask the question it seems to me you have already formed the mental impression they turn over easily.

THE COURT: Well, they apparently do.

MR. PINTO: Well, sir, that's why we are here. That's the subject of the litigation, one of the subjects of the litigation. I think you have already prejudged —

THE COURT: No, I haven't prejudged that at all. I don't know what — I don't even know what frequently means. Maybe 400 times isn't frequent.

MR. PINTO: Well, 400 cases — it is easy to say they have been sued 400 times. Does that mean that they're guilty 400 times?

THE COURT: No. I'm not saying that at all. I'm not even —

MR. PINTO: I think you are impressed with the number.

THE COURT: No, no, that doesn't bother me. Think of the number of FELA cases there are.

MR. PINTO: Think of the number of suits against General Motors, the number of cars they make.

THE COURT: Sure.

MR. PINTO: Every time somebody gets hurt and a car runs off the road they get a suit.

THE COURT: Sure.

MR. PINTO: So the number of suits doesn't have anything to do with whatever is or —

THE COURT: No, I agree with that.

MR. PINTO: Well, Your Honor, all I can say in summation is that I hope —

THE COURT: Well, I'm going to ask you one question. Interrogatory Number 11 in the Shank case says:

> "Give the name, address, telephone number, job title, department and other pertinent information needed to identify each and every person, group, department, unit, agency, et cetera, with AMC or Jeep Corporation responsible for consumer safety in Jeep vehicles from the time AMC acquired Jeep Corporation until the present."

Your answer was:

> "Defendants are not certain what plaintiffs mean by consumer safety."

MR. PINTO: Well, sir, I think we'd better put that in context because I know Your Honor was disturbed when you saw the letter signed by the man who called — who was the vice president of Safety.

THE COURT: The vice president of Safety, and you couldn't answer that interrogatory?

MR. PINTO: Well, Number 1, he's not the man solely responsible for safety. Every engineer in the company deals with safety in their job.

THE COURT: Now a frank answer to that interrogatory would have been F. A. Stewart is the vice president in charge of Safety.

MR. PINTO: Well, sir, that would have been misleading because F. A. Stewart has the title of vice president of Safety and Reliability. Because it's his duty to re-

spond to the Government concerning Government regulations on safety, that doesn't mean that it's his job to see that consumer safety is incorporated in engineering in the cars in the plant, and that's something I haven't had the opportunity to tell you before.

It's very simple to sit here and say, "Hey, there is a vice president of Safety. Who are they kidding?" The man's job wasn't as overseer of the safety that goes into cars. Now if I'm wrong maybe Miss Burns can correct me.

MISS BURNS: What Mr. Pinto says is correct, and I don't know whether it was in response to Interrogatory Number 11, but we did identify the vehicle safety department and explained that that was concerned solely with compliance with Federal statutes.

THE COURT: You were about to say, Mr. Pinto, in sort of a —

MR. PINTO: Your Honor, —

THE COURT: Maybe you forgot what you were going to say.

MR. PINTO: Your Honor, in summary I hope this is almost over because it's been a very trying day for me. I sincerely —

THE COURT: Yes, you had a bad time the last time when you had your tax return to —

MR. PINTO: Well, you know, I kind of resent my opponents taking advantage of an opportunity. I thought I had to be a little light in a very somber proceeding. Your Honor is famous for his sense of humor, and yet because I happen to represent somebody who is a villan in their eyes it's a kind of terrible thing for me to inject a little lightness and tell a joke.

Now, the fact is it was April the 15th and —

THE COURT: Well, I took it as you intended it because I said, "Can I help you with your tax return?"

MR. PINTO: I think you did, but the fact that my opponent sought to refer to it in his brief as being an ex-

ample of my attitude about the case, I resent it and I did want the opportunity to say that.

Now, to sum up, I have heard a lot of accusations against my client which we are prepared to meet at the appropriate time. I have not yet heard one word that justifies this Court keeping this case after saying, "Automobile manufacturers are the most devious group of defendants I have even seen," and following that up with a reference to one that you held in default and entered a default judgment against previously.

I say, Your Honor, sincerely, that what you have said indicates that you are using guilt by association to paint my client with the same brush. The appearance alone is sufficient under 455(a) to require Your Honor to transfer the case to another judge.

Thank you.

THE COURT: Anything further?

MR. CHERRY: No, sir.

(Court adjourned 11:30 a.m.)